No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), imposes a mandatory minimum prison term of 15 years upon any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." The definition of a "violent felony" includes a burglary conviction that is punishable by imprisonment for a term exceeding one year. See *id.* § 924(e)(2)(B)(ii). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that § 924(e) uses the term "burglary" in its generic sense, to cover any crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 598-599.

The question presented is:

Whether *Taylor*'s definition of generic burglary requires proof that intent to commit a crime was present at the time of unlawful entry or first unlawful remaining.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 850 F.3d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017, and a timely petition for rehearing en banc was denied on June 28, 2017. Justice Kagan extended the time in which to file a petition for a writ of certiorari to November 24, 2017, and the petition was filed on that day. The Court granted the petition on January 11, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the relevant statutory provisions—18 U.S.C. §§ 922(g) and 924, and Mich. Comp. Laws § 750.110a—appear in the appendix to the petition for a writ of certiorari. Pet. App. 11a-17a.

INTRODUCTION

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on any convicted felon who unlawfully possesses a firearm and who has three or more prior convictions for any "violent felony or * * * serious drug offense." 18 U.S.C. § 924(e)(1). ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary." *Id.* § 924(e)(2)(B)(ii). This Court has held that ACCA uses the term "burglary" in its generic sense, meaning it has the "basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime." *Taylor* v. *United States*, 495 U.S. 575, 599 (1990). That definition reflects how the offense of burglary was defined "in the criminal codes of most States" around the time of

ACCA's enactment in the mid-1980s. *Id.* at 598; see also *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018) (adopting ACCA interpretation consistent with how "a majority of state burglary statutes" defined the offense "[i]n 1986").

At common law, it was well established that burglary required proof that the defendant intended to commit another crime at the time of his unlawful entry into the premises. *E.g.*, Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(e), at 473 & n.101 (1986). The question here is whether the generic definition of burglary under ACCA retains that longstanding contemporaneous-intent requirement, such that a state offense does not qualify as ACCA "burglary" if it does not require proof that the defendant intended to commit another offense at the time he unlawfully entered, or first unlawfully remained in, the premises.

Taylor resolves that question. *Taylor* envisioned two alternative means of committing generic burglary: "unlawful or unprivileged entry * * * with intent to commit a crime," and "unlawful or unprivileged * * * remaining * * * with intent to commit a crime." 495 U.S. at 598. The "remaining" prong must refer to the initial moment when the privilege to be in lawfully entered premises ceases. Otherwise, the alternative "entry" prong would be superfluous: For all practical purposes, every unlawful entry is immediately followed by unlawful "remaining in" the illegally entered premises. Therefore, just as the "entry" prong refers to a particular moment in time at which the "intent to commit a crime" must exist, the parallel "remaining" prong is most naturally read as referring to the initial

moment of unlawful "remaining," and requires the intent to commit another crime to exist at that time.

This conclusion is consistent with the prevailing understanding of burglary when ACCA was enacted in 1984 and amended in 1986. Leading authorities at that time—including LaFave and Scott's *Substantive Criminal Law* treatise and the Model Penal Code, both of which this Court cited in *Taylor*, 495 U.S. at 598 & n.8—recognized the continuing vitality of the common-law contemporaneous-intent requirement. And at that time, a substantial majority of state burglary laws continued to require proof of contemporaneous intent; only a small minority of states had dispensed with that requirement.

Demanding proof of contemporaneous intent is also consistent with Congress's objective of focusing ACCA's stringent penalties on a discrete category of dangerous career criminals. The government (and the Sixth Circuit's decision below) would extend ACCA to a homeless defendant with a handful of convictions for committing low-risk, spur-of-the-moment crimes of opportunity, such as stealing clothing or food, while trespassing to seek shelter from the cold. But there is no indication that Congress would have viewed such defendants as "career" offenders who make their livelihood from crime, or as the kind of dangerous criminals who are likely to "use [a] gun deliberately to harm a victim." *Begay* v. *United States*, 553 U.S. 137, 145 (2008).

The government's request that this Court dispense with the contemporaneous-intent requirement lacks any basis in ACCA's text, history, or purpose and conflicts with this Court's precedent and prevailing state

practice around the time of ACCA's enactment. This Court should hold that a state offense qualifies as generic burglary under ACCA only if it requires proof of contemporaneous intent. Because the ACCA predicate at issue here—a 2001 Michigan conviction for home invasion in the third degree, Mich. Comp. Law § 750.110a(4)—did not require such proof, the judgment below should be reversed.

STATEMENT

1. Under 18 U.S.C. § 922(g)(1), it is unlawful for an individual who has previously been convicted of a felony (*i.e.*, "a crime punishable by imprisonment for a term exceeding one year") to possess a firearm. 18 U.S.C. § 922(g)(1). The maximum prison sentence for violating § 922(g)(1) is usually ten years. *Id.* § 924(a)(2). ACCA, however, replaces that ten-year maximum with a 15-year *minimum* sentence for individuals convicted under § 922(g)(1) who have three or more prior convictions for certain qualifying offenses. 18 U.S.C. § 924(e).

When Congress originally enacted ACCA in 1984, it limited the predicate offenses that could trigger the 15-year minimum to "robbery" and "burglary." Pub. L. No. 98-473, ch. 18, 98 Stat. 1837, 2185 (1984). The statute defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Ibid.*

Congress enacted ACCA because of concerns about "the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem." *Taylor* v. *United States*, 495 U.S. 575, 583 (1990). In

particular, the 1984 Congress "singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense * * * because of its inherent potential for harm to persons." *Id.* at 588. "The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant," and "the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Ibid.*

In 1986, Congress amended ACCA to expand the predicate offenses triggering the sentence enhancement from simply "robbery or burglary" to any "violent felony or * * * serious drug offense." Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-39 (1986) (codified as amended at 18 U.S.C. § 924(e)). The amended statute defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). In what this Court would later conclude appears to "have been an inadvertent casualty of a complex drafting process," Congress in 1986 deleted the 1984 Act's definition of "burglary." *Taylor*, 495 U.S. at 589-590.

In its 1990 decision in *Taylor*, this Court addressed the meaning of the term "burglary" in the absence of a

statutory definition. The Court held that, as used in § 924(e), "burglary" refers to "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. According to *Taylor*, generic burglary includes any crime, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. In support of that definition, the Court cited the 1986 edition of Wayne R. LaFave and Austin W. Scott, Jr.'s *Substantive Criminal Law* treatise and the Model Penal Code. *Id.* at 598 & n.8. The Court also emphasized that this generic definition of burglary "is practically identical" to the burglary definition set forth in the 1984 Act. *Id.* at 598.

2. To find that a predicate offense qualifies as generic burglary under ACCA, a court must use a "categorical approach," which "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). A crime cannot qualify as an ACCA predicate if its elements are broader than those of the generic offense. *Id.* at 2251. This is true "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *Id.* at 2248. In such a case, "the mismatch of elements saves the defendant from an ACCA sentence." *Id.* at 2251. This elements-focused approach accords with ACCA's text and reflects this Court's recognition that the Sixth Amendment precludes increasing a defendant's maximum sentence based on a judge's factual findings regarding "the manner in which the defendant committed [a prior]

offense." *Id.* at 2252. It also avoids "unfairness to defendants." *Id.* at 2253. As this Court explained in *Mathis*:

> Statements of non-elemental fact in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Ibid. (citations omitted).

When a single statute lists elements in the alternative, this Court has approved use of a "modified categorical approach," under which sentencing courts can look to a limited class of documents to determine the version of the crime of which the defendant was convicted, and its basic elements.[1] *Mathis*, 136 S. Ct. at 2249. When the predicate offense was decided by a jury, the sentencing court may look to the charging document and jury instructions. *Taylor*, 495 U.S. at 602. When the predicate offense resulted from a guilty plea, the sentencing court may look to "the charging

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[1] Although Quarles argued below that his conviction under Mich. Comp. Law § 750.110a(4) does not constitute a conviction for generic burglary under the modified categorical approach, neither the district court nor the Sixth Circuit had occasion to reach the issue, having resolved his challenge on the threshold question presented here.

document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

The class of approved documents is necessarily limited to those "approaching the certainty of the record of conviction" so that the sentencing judge can avoid making a disputed finding of fact that implicates Sixth Amendment concerns. *Shepard*, 544 U.S. at 23-25 ("[A]ny fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." (citing *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999))).

3. Petitioner Jamar Quarles pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). J.A. 115-116. The question presented in this case stems from the parties' dispute about whether Quarles's 2001 Michigan conviction for home invasion in the third degree qualifies as "burglary" under ACCA. See J.A. 24-28 (Quarles's state-court information and judgment). The Michigan statute under which Quarles was convicted, Mich. Comp. Law § 750.110a(4), provides:

> A person is guilty of home invasion in the third degree if the person * * *
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without

permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

To convict Quarles under this statute, all the prosecution had to establish was that Quarles "commit[ted] a misdemeanor" while "present in" a dwelling that he had "enter[ed] * * * without permission" (or had broken and entered). The prosecution was not required to prove that Quarles harbored any intent to commit another offense when he unlawfully entered the dwelling, or at any other time preceding the misdemeanor's commission. Indeed, for a defendant accused of committing a strict-liability offense or a misdemeanor with a scienter requirement of only negligence or recklessness, the prosecution could obtain a conviction under § 750.110a(4) without proving that the defendant ever intended to commit any offense beyond criminal trespass See, *e.g.*, Mich. Comp. Laws § 750.520e(1)(a) (misdemeanor statutory-rape provision); *People* v. *Cash*, 351 N.W.2d 822, 824-828 (Mich. 1984) (statutory rape involves "strict liability"). In effect, § 750.110a(4) converts any misdemeanor into a felony punishable by up to five years of imprisonment if the defendant happens to commit the misdemeanor while present in a dwelling that he entered without permission. See Mich. Comp. Law § 750.110a(7).

Section 750.110a(4) is a recent innovation. At the time of ACCA's 1984 enactment and 1986 revision, Michigan's burglary analogues required proof that the defendant entered a structure "with intent to commit" a felony or larceny therein. Mich. Comp. Law §§ 750.110, 750.111 (1968). In 1994, the Michigan legislature first enacted the home-invasion statute under which Quarles was convicted. Like prior law, however,

the 1994 statute continued to require the prosecution to establish that the defendant entered a dwelling "with intent to commit a felony or a larceny." 1994 Mich. Pub. Acts 1264. Not until 1999—over a decade after ACCA's enactment and subsequent revision—did the Michigan legislature amend § 750.110a to proscribe commission of misdemeanors within dwellings entered without permission. 1999 Mich. Pub. Acts 120, 120-121.

4. Before his guilty plea, Quarles sought the district court's determination whether his third-degree home invasion conviction constituted a "violent felony" under ACCA. R.15. The court declined to make that determination before sentencing. R.19 at 65. Quarles then pleaded guilty.

At sentencing, Quarles's final presentence report identified only three convictions as crimes of violence, including his 2001 Michigan conviction for third-degree home invasion. R.25 ¶¶ 51, 54, 56. Quarles argued that the 2001 conviction does not satisfy the elements of generic burglary under *Taylor* and thus does not qualify as a "violent felony" under ACCA.[2] R.50 at 376-377 (Sentencing Memorandum); J.A. 93-94. Quarles contended that § 750.110a(4) lacks the requisite *Taylor* elements because it does not require proof of intent to commit a crime at the moment the defendant entered or first unlawfully remained inside the building. *Ibid.* The district court concluded that a

[2] The district court originally ruled that Quarles's Michigan conviction was a violent felony under ACCA's residual clause. J.A. 83. Quarles appealed, and the Sixth Circuit remanded for resentencing in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which held that the residual clause is unconstitutionally vague. See J.A. 83.

conviction under § 750.110a(4)(a) constitutes generic burglary under ACCA, J.A. 104, and on May 16, 2016, sentenced Quarles to 204 months' imprisonment, J.A. 117.

5. The court of appeals affirmed. Pet. App. 1a-8a. The court acknowledged that "[t]he question of whether generic burglary requires intent at entry has resulted in a circuit split * * * [that] hinges on whether the 'remaining in' language allows for the development of intent at any point or whether the intent must exist" at the time the defendant enters or first unlawfully remains inside the building. *Id.* at 7a. But according to the court of appeals, "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." *Id.* at 8a (quoting *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015)). Thus, the court held that "generic burglary * * * does not require intent at entry; rather the intent can be developed while 'remaining in.'" *Ibid.* The court of appeals denied Quarles's timely petition for rehearing en banc. *Id.* at 9a-10a.

SUMMARY OF ARGUMENT

Quarles's third-degree home invasion conviction does not qualify as ACCA "burglary" because it did not require proof that Quarles intended to commit a crime at the time of his initial unlawful entry or remaining. In *Taylor*, this Court held that, in enacting and amending ACCA in the mid-1980s, Congress adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." 495 U.S. at 598-599. By its plain language, that definition requires

intent to commit a crime to exist contemporaneously with the unlawful or unprivileged entry or initial unlawful or unprivileged remaining. "Entry" indisputably refers to a particular moment in time. Similarly, the parallel "remaining" prong is most naturally read as referring to the initial moment of unlawful or unprivileged presence—at which time the "intent to commit a crime" must exist. By contrast, if "remaining" refers to a continuous condition rather than a discrete moment in time, the "entry" prong would be superfluous; effectively every unlawful entry would immediately be followed by unlawful "remaining."

As leading English and American authorities demonstrate, the requirement that the offender intended to commit another crime at the moment of initial unlawful occupation has for centuries been considered a fundamental component of the offense of burglary. Indeed, the two authorities on which *Taylor* principally relied in defining "the generic, contemporary meaning of burglary"—the 1986 edition of LaFave and Scott's *Substantive Criminal Law* treatise and the Model Penal Code—both unequivocally took the position that burglary requires proof of contemporaneous intent. The longstanding importance of the contemporaneous-intent requirement reflects burglary's status as a special form of the inchoate crime of "attempt"—the foundational element of which is the intent to commit an offense.

The government cannot show that when Congress enacted and amended ACCA in the mid-1980s, state laws had evolved to such an extent that "most States" had dispensed with the contemporaneous-intent requirement. *Taylor*, 495 U.S. at 598. As of 1986, a substantial majority of states (at least 37) retained a

contemporaneous-intent requirement, while only a small minority of states had dispensed with it, and in still other states the law was unsettled.

The contemporaneous-intent requirement is also consistent with Congress's objective of reserving ACCA's stringent penalties for "a small number" of dangerous career criminals. *Taylor*, 495 U.S. at 583. Individuals who commit spur-of-the-moment crimes of opportunity while trespassing are not the professional criminals whom ACCA targets. Nor do their unplanned crimes suggest that they are the kind of violent person likely to "deliberately point [a] gun and pull the trigger." *Begay* v. *United States*, 553 U.S. 137, 146 (2008).

At minimum, the rule of lenity requires resolving any ambiguity regarding burglary's generic definition in Quarles's favor. Requiring proof of contemporaneous intent would also avoid the serious due process concerns of vagueness that would result from jettisoning such a deep-rooted and widely adopted component of the common-law offense.

ARGUMENT

For centuries, a defining characteristic of the offense of burglary was the required showing of contemporaneous intent: The defendant must have intended to commit an additional offense "at the time" of his unlawful entry into the relevant structure. Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(e), at 473 & n.101 (1986) (LaFave & Scott (1986)). To prevail here, the government must show that by "the time [ACCA] was passed" in 1984 and amended "[i]n 1986," that settled understanding of burglary had evolved to such an extent that "a

majority of state burglary statutes" extended to individuals who lacked intent to commit another offense either at the time of entry or at the time of their initial unlawful presence in the premises. *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018).

The government cannot make that showing. Its rejection of the contemporaneous-intent requirement conflicts with *Taylor*'s articulation of "the generic, contemporary meaning of burglary" at the time of ACCA's enactment, as well as with the understanding in the principal authorities on which *Taylor* relied—Congress's 1984 definition of burglary, the 1986 edition of LaFave and Scott's *Substantive Criminal Law* treatise, and the Model Penal Code. The government's position also conflicts with the majority position among states in the mid-1980s that burglary required proof of the defendant's intent to commit another offense *at the time* of the defendant's unlawful entry or initial unlawful remaining. Finally, any attempt to extend ACCA to prior convictions for crimes of opportunity while trespassing conflicts with Congress's intent to focus ACCA's stringent 15-year mandatory minimum penalty on *career* offenders who make their livelihood from crime and are likely to "use [a] gun deliberately to harm a victim." *Begay*, 553 U.S. at 145.

The Sixth Circuit thus erred by holding that "the 'remaining in' language" in *Taylor*'s definition of burglary "allows for the development of intent at any point" while the defendant is unlawfully present in the premises. Pet. App. 7a-8a. Once that definitional error is corrected, it is clear that the Michigan statute involved here sweeps far beyond the definition of generic burglary. See Mich. Comp. Laws § 750.110a(4)(a). The offense defined by this provision

is broader than the generic definition of burglary because it allows conviction for simply "commit[ing] a misdemeanor" while "present in" "a dwelling" "without permission." *Ibid.* The judgment below must therefore be reversed.

I. *TAYLOR* AND ACCA DEMAND CONTEMPORANEOUS INTENT

In *Taylor*, this Court rejected the notion that ACCA reaches any crime that happens to carry the title "burglary." 495 U.S. at 590-592. Instead, the Court concluded that, in enacting and amending ACCA in the mid-1980s, Congress adopted "the generic, contemporary meaning of burglary," with three elements: "[1] an unlawful or unprivileged entry into, or remaining in, [2] a building or other structure, [3] with intent to commit a crime." *Id.* at 598-599. This definition is "practically identical" to ACCA's original statutory definition of "burglary," *id.* at 598, which covered "any felony consisting of entering or remaining surreptitiously within a building * * * *with intent to engage* in conduct constituting a Federal or State offense," 98 Stat. at 2185 (emphasis added). "[N]othing in [ACCA's legislative] history" suggests that "Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Taylor*, 495 U.S. at 590. Instead, "the deletion of the 1984 definition of burglary" appears to "have been an inadvertent casualty of a complex drafting process." *Id.* at 589-590.

"The most natural reading of *Taylor*" is that its definition of generic burglary "requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent." *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir.

2017) (Colloton, J.). *Taylor* presents "remaining in" as "an alternative means to 'entry.'" *United States* v. *Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (Higginbotham, J., concurring in judgment). Because "entry" refers to a particular moment in time, the parallel "remaining prong" is most naturally read as similarly referring "to the *initiation* of the trespass." *Ibid.* Therefore, like entry, "[t]he act of 'remaining in' a building, for purposes of generic burglary, is not a continuous undertaking"; rather, "it is a discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome." *McArthur*, 850 F.3d at 939; accord *Van Cannon* v. *United States*, 890 F.3d 656, 665 (7th Cir. 2018) ("discrete, alternative acts"). And *Taylor*'s use of the word "with" in defining the intent requirement—"*with* intent to commit a crime"—indicates that "the intent [must] accompany" the defendant's initial unlawful "entry" or "remaining." *United States* v. *Bonilla*, 687 F.3d 188, 197 (4th Cir. 2012) (Traxler, C.J., dissenting) (citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* 2183 (2001) (defining "with" as "accompanied by; accompanying")); see also *McArthur*, 850 F.3d at 939 (emphasizing *Taylor* definition's use of "with"); *Bernel-Aveja*, 844 F.3d at 218 (Higginbotham, J., concurring in judgment) (same).

The government's contrary reading would render *Taylor*'s "unlawful entry" language superfluous. *McArthur*, 850 F.3d at 939. If "remaining" refers to a continuous condition rather than a discrete moment in time, then "every unlawful entry with intent would become 'remaining in' with intent as soon as the perpetrator enters," so *Taylor*'s "unlawful entry" prong

would be meaningless. *Ibid.*; accord *Bernel-Aveja*, 844 F.3d at 218 (Higginbotham, J., concurring in judgment); see also *United States* v. *Herrold*, 883 F.3d 517, 532 (5th Cir. 2018) (en banc) (government's position "puts entry almost entirely out of focus; because all entry is followed by its version of remaining in, and because the remaining in lasts until departure, almost every instance of entry would automatically involve remaining in"). This Court has previously rejected government efforts to rewrite *Taylor*, emphasizing that "a good rule of thumb for reading [this Court's] decisions is that what they say and what they mean are one and the same." *Mathis*, 136 S. Ct. at 2254. To give full weight to *Taylor*'s carefully constructed definition of generic burglary, both "unlawful entry" and "remaining in" must be read as discrete moments when an unlawful occupation begins. Therefore, a crime is only generic burglary if this specific act is done "with intent to commit a crime."

Congress's 1984 definition of "burglary" confirms that the definition of generic burglary applicable to ACCA cases incorporates a contemporaneous-intent requirement. The 1984 definition covered "entering or remaining surreptitiously * * * with intent to engage in [criminal] conduct." 98 Stat. at 2185. That definition required the criminal intent to exist at the time the defendant was "remaining surreptitiously." Thus, under the 1984 definition, "burglary" would not encompass instances where a defendant hid himself inside a building while it was open to the public, came out of hiding after the building closed for the day, and *thereafter* formed the intent to commit an offense. Such a defendant could not be said to have "remain[ed] surreptitiously * * * with intent to engage in [criminal]

conduct." Therefore, the Sixth Circuit's conclusion that "the development of intent [can occur] *at any point*" while the defendant is unlawfully present in the premises (Pet App. 7a; emphasis added) conflicts with Congress's 1984 definition of burglary, which this Court viewed as "practically identical" to *Taylor*'s definition of generic burglary. *Taylor*, 495 U.S. at 598.

II. CONTEMPORANEOUS INTENT WAS A FUNDAMENTAL COMPONENT OF BURGLARY AT COMMON LAW, AND MOST STATES RETAINED THAT RULE WHEN ACCA WAS ENACTED

At common law, the requirement that the offender intended to commit another crime at the moment of initial unlawful occupation was a fundamental component of the offense of burglary. That remained true at the time of ACCA's enactment. As of the mid-1980s, a substantial majority of state burglary laws retained the contemporaneous-intent requirement; only a small minority had abandoned it. Because ACCA and this Court's case law call for courts to apply the generic definition of burglary as it existed when ACCA was enacted and amended in the mid-1980s, a state offense does not qualify as "burglary" under ACCA unless it requires proof that the defendant intended to commit another crime at the time of his initial unlawful entry or occupation.

A. Contemporaneous Intent Was A Fundamental Component Of Common-Law Burglary

"Burglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony."

Taylor, 495 U.S. at 580 n.3 (citation omitted). Although this common-law definition incorporated some "arcane distinctions" that were no longer in general use at the time of ACCA's enactment—*e.g.*, the requirement that the entry occur "in the nighttime"—this case does not involve a peripheral element. *Id.* at 593. To the contrary, "[c]ontemporaneous intent was the essence of burglary at common law, as it was the element that distinguished the offense from trespass." *Bonilla*, 687 F.3d at 196 (Traxler, C.J., dissenting); accord *Van Cannon*, 890 F.3d at 665; *Bernel-Aveja*, 844 F.3d at 218 (Higginbotham, J., concurring in judgment) ("that the perpetrator trespass while already harboring intent to commit a further crime" is "the most fundamental character of burglary").

The most eminent English expositors of the common law emphasized the centrality of burglary's contemporaneous-intent requirement. Blackstone explained, "[I]t is clear[] that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass." 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769). Sir Edward Coke similarly emphasized that unlawful entry into a home with intent to commit an offense other than a felony would not constitute burglary. Edward Coke, *The Third Part of the Institutes of the Laws of England* 65 (1644) (entering home "to beat, and not to kill," is "no burglary" because "the intent must be to commit felony"). And Joseph Chitty wrote:

> No breaking and entering * * * will be esteemed burglary unless the party intended, at the time, to commit a felony. For if the intent were only to commit a trespass, though it is possible death might ensue, it is not burglary; *as the felonious intention*

> *at the time of the breaking is necessary to constitute the offence.*

3 Joseph Chitty, *A Practical Treatise on the Criminal Law* 1095 (1816) (emphasis added) (citations omitted).

American treatise writers, including the authors of what was "[p]erhaps America's first homegrown treatise on criminal law,"[3] agreed: The "breaking and entry" required for common-law burglary "must be with a felonious intent, otherwise it is only a trespass." Harry Toulmin & James Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky* 215 (1804). Accordingly, "[t]he intent must exist at the time of the breaking and entry"; "[i]f it is conceived for the first time after entry, and carried out, the crime is not committed." William L. Clark, Jr., *Hand-Book of Criminal Law* 238 (1894); accord M. Cherif Bassiouni, *Substantive Criminal Law* 340 (1978) ("Any intent to commit a felony which is acquired by an intruder after being on the premises—even though unlawfully—and which he or she did not have at the time of the breaking in and entry, is not burglary."). Because "[t]he intention to commit a felony must concur in point of time with the breaking and entering," "no burglary" occurs "[i]f the person breaking and entering the house merely intends to commit a trespass," even if "after he is in the house he * * * commit[s] a felony which he did not intend at the time he broke and entered." John G. Hawley & Malcolm McGregor, *The Criminal Law* 186 (1896); see also 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 112 (3d ed. 1865) ("When the

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[3] Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 Buff. Crim. L. Rev. 691, 721 (2003).

object of the offender is to commit only a misdemeanor, and unintentionally what he does amounts to a felony in law, still, although he is indictable for this felony done, yet, as it was not intended, he is not guilty of burglary. The doctrine is, that there must be a particular intent to do a particular act, which act is a felony; and this intent must be proved to have existed in the mind of the defendant, as a matter of fact, not merely as a matter of law." (footnote omitted)).

The importance that the common law placed on the contemporaneous-intent requirement reflects the fact that burglary arose as a special form of "attempt" crime. See 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1(g) (3d ed. 2018) (LaFave (2018)). Burglary addressed at least two "defects [in] the traditional law of attempt." American Law Institute, Model Penal Code § 221.1, commentary, pp. 62-63 (Official Draft and Revised Comments 1980) (Model Penal Code (1980)). First, because the "common law of attempt ordinarily did not reach a person who embarked on a course of criminal behavior unless he came very close to his goal," intruders apprehended soon after breaking into a dwelling may "not have committed an attempt" under the common law because they may not yet "have arrived at the [precise] scene" of their intended crime. *Id.* at 63. Second, "even when the actor's conduct reached the stage where an attempt was committed, penalties for attempt [at common law] were disproportionately low as compared to penalties for the completed offense." *Ibid.*

The common-law offense of burglary "provided a partial solution to these problems": "Making entry with criminal intent an independent substantive offense carrying serious sanctions moved back the

moment when the law could intervene in a criminal design and authorized penalties more nearly in accord with the seriousness of the actor's conduct." Model Penal Code § 221.1, commentary, p. 63 (1980); accord *People* v. *Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989). And because "every burglary is * * * an attempt to commit some other crime," burglary requires proof of the fundamental element of attempt—the intent to commit an offense. Model Penal Code § 221.1, commentary, p. 63 (1980); see also, *e.g.*, American Law Institute, Model Penal Code § 5.01, commentary, p. 305 (Official Draft and Revised Comments 1985) (noting "the common law requirement of purposive conduct as a prerequisite for attempt liability"); 2 LaFave § 11.3(a) (2018) ("mental state required for the crime of attempt * * * is an intent to commit some other crime"). "A defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar." *Gaines*, 546 N.E.2d at 915.

B. Leading Commentators Around The Time Of ACCA's Enactment Continued To View Contemporaneous Intent As A Fundamental Requirement Of Burglary

Around the time of ACCA's enactment, leading commentators continued to view contemporaneous intent as a fundamental requirement of burglary, thus indicating that the Congress that enacted and amended ACCA understood the term "burglary" to encompass a contemporaneous-intent requirement. In defining "the generic, contemporary meaning of burglary" in *Taylor*, this Court relied principally on two authorities—the 1986 edition of LaFave and Scott's *Substantive Criminal Law* treatise and the American Law Institute's Model Penal Code. *Taylor*, 495 U.S. at 598 & n.8. Both unequivocally took the position that burglary requires proof of contemporaneous intent. See *McArthur*, 850 F.3d at 939 (citing LaFave and Scott and the Model Penal Code).

LaFave and Scott explained: "To have committed the offense of burglary at common law, one must have intended to commit a felony while fulfilling the other requirements." LaFave & Scott § 8.13(e), at 473 (1986). Therefore, in jurisdictions not recognizing a "remaining in" theory of burglary liability, "the intent must exist at the time of the entry." *Id.* at 473 n.101. "If the actor when he was breaking and entering only intended to commit a simple trespass, he was not guilty of a burglary although he in fact committed a felony after entering." *Id.* at 473. Even in jurisdictions recognizing the "remaining in" theory, "the requisite intent to commit a crime within need[ed]" to "exist *at*

the time the defendant unlawfully remained within." *Id.* § 8.13(b), at 468 (emphasis added).

Similarly, the Model Penal Code's definition of burglary requires proof that the defendant "enter[ed] a building or occupied structure * * * with purpose to commit a crime therein." Model Penal Code § 221.1(1) (1980). Thus, under the Model Penal Code, a purpose to commit another offense "must accompany the intrusion." *Id.* § 221.1, commentary, p. 75. The Model Penal Code's position ensures that burglary convictions will not be imposed on those who "intru[de] for such innocent purposes as sleep, [or] escape from inclement weather." *Id.* at 76. It also reflects the fact that "[m]ost [state] statutes in effect" when the Model Penal Code was completed in 1962 "required a specific intent at the time of the entry." *Id.* at 60 n.**, 64 n.6.

Other commentators writing in the decades preceding ACCA's enactment reached similar conclusions. A 1951 survey of state burglary laws noted: "Like the common law, almost all jurisdictions today define burglary so as to require intent to commit a crime other than the crime of burglary. *This intent must exist at the time of entry.*" Note, *A Rationale of the Law of Burglary*, 51 Colum. L. Rev. 1009, 1016 (1951) (emphasis added) (footnote omitted). The survey thus concluded that "[b]urglary may be considered generally to consist of a trespassory entry into certain buildings *with the intent to commit certain crimes therein*," meaning that "*every* burglar enters with intent to commit a further crime inside the building." *Id.* at 1020 (emphasis added). Another article emphasized that at common law, "the intent [to commit a felony] had to be present at the time of the entry, *not formed thereafter*." Minturn T. Wright III, Note, *Statutory Burglary—The*

Magic of Four Walls and a Roof, 100 U. Pa. L. Rev. 411, 413-414 (1951) (emphasis added). After surveying then-existing state laws, the article concluded that the "gravamen of the crime today" remained "the felonious intent of the burglar." *Id.* at 433; accord *id.* at 436 n.197.

C. At The Time Of ACCA's Enactment, Only A Small Minority Of States Had Rejected The Contemporaneous-Intent Requirement

Given the centuries of authority emphasizing contemporaneous intent as an essential element of the offense of burglary, the government faces a daunting burden here. It must show that by the mid-1980s, when Congress enacted and amended ACCA, state criminal codes had evolved to such an extent that "most States" had dispensed with the contemporaneous-intent requirement. *Taylor*, 495 U.S. at 598; see also, *e.g.*, *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) ("[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." (citation omitted)). Absent such a showing, it must be presumed that Congress understood its use of the term "burglary" in ACCA to encompass the deeply rooted contemporaneous-intent requirement, which—as explained above—leading authorities viewed as retaining vitality at the time of ACCA's enactment. Cf. *Taylor*, 495 U.S. at 592, 594-595 (recognizing that "a statutory term is generally presumed to have its common-law meaning" unless "that meaning is obsolete or inconsistent with the statute's purpose"); 2B Norman Singer & Shambie Singer, *Sutherland Statutes and*

Statutory Construction § 50:1 (7th ed. 2018) ("All legislation is interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment.").

The government cannot make the requisite showing. Below (pp. 30-51, *infra*) is a summary of the burglary laws of all 50 states and the District of Columbia as of 1986, when ACCA was amended and the 1984 definition of "burglary" was deleted. See *Stitt*, 139 S. Ct. at 406 (surveying state of the law "[i]n 1986" in interpreting ACCA). As the summary shows, a substantial majority of states—at least 37—retained a contemporaneous-intent requirement as of 1986. By contrast, in 1986, only a small minority of states (9) had dispensed with the contemporaneous-intent requirement.[4]

The example of New York illustrates that, around the time of ACCA's enactment, contemporaneous intent was still widely considered to be a fundamental component of burglary. New York's burglary statutes, which have not been amended since 1981, apply to anyone who "knowingly enters or remains unlawfully in a [building or dwelling] with intent to commit a crime

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[4] The laws of the remaining states were ambiguous on this issue as of 1986—although even several of those strongly suggest retention of a contemporaneous-intent requirement. For the reasons explained above, see pp. 25-26, *supra*, ambiguity militates *against* adopting the government's position here: Given the centrality of the contemporaneous-intent requirement at common law, it should not be presumed that a state whose laws were ambiguous had rejected that requirement; to the contrary, it would be more reasonable to conclude that the ambiguity would likely be resolved in favor of retaining the longstanding contemporaneous-intent element.

therein." N.Y. Penal Law §§ 140.20-140.30 (McKinney 2019). In *People* v. *Gaines*, 546 N.E.2d 913, 914 (N.Y. 1989), the defendant was arrested as he emerged from the window of a building supply company. He was wearing clothing and a jacket taken from the building. *Ibid.* Other than some pens found in the jacket's pocket, the defendant took no other items from the building. *Ibid.* In his subsequent burglary prosecution, the defendant testified that he was homeless, had taken refuge in the building on a snowy night, and had put on the clothing and jacket to keep warm. *Ibid.* The trial court rejected the defendant's request that the jury be instructed that it had to find that the defendant intended to commit a crime when he unlawfully entered the building. *Ibid.*

The New York Court of Appeals considered whether jurors "should have been instructed that they must find defendant's intent to commit a crime in the building existed *at the time* of the entry, or whether no such instruction need have been given, because the 'remains unlawfully' element of the statute means that such intent may be formed *after* defendant's unlawful entry." *Gaines*, 546 N.E.2d at 914. Reversing the defendant's conviction, the court concluded that New York law required proof that the defendant "inten[ded] to commit a crime in the building * * * at the time of the unlawful entry." *Ibid.*

The court emphasized that at common law, "[u]nless the intent to commit a felony existed at the time of the breaking and entry, there was no burglary." *Gaines*, 546 N.E.2d at 914. The court determined that the New York legislature did not intend to override the "long-standing" contemporaneous-intent requirement when it adopted a "remaining in" theory of burglary.

Id. at 915. As the court explained, a "defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar." *Ibid.* According to the court, "[b]y the words 'remains unlawfully' the Legislature sought to broaden the definition of criminal trespass, not to eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Ibid.* The court thus held:

> In order to be guilty of burglary for unlawful remaining, a defendant must have entered legally, but remain for the purpose of committing a crime after authorization to be on the premises terminates. And in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry. *In either event, contemporaneous intent is required.*

Id. at 915-916 (emphasis added).

Gaines—which was decided less than a year before *Taylor*—demonstrates that *Taylor*'s reference to "remaining in" liability did not constitute a repudiation of the deep-rooted contemporaneous-intent requirement. Indeed, the Delaware Supreme Court recognized in 2007 that "a majority" of states with statutes similar to New York's have "held that a person must form the intent to commit a crime in the dwelling either before entering the premises or contemporaneously upon entering the premises," while only a "minority of jurisdictions ha[d] held that a person may form the required intent to commit a crime 'therein' while he remains unlawfully in the dwelling," and the court chose to "join the majority" requiring proof of contemporaneous

intent. *Dolan* v. *State*, 925 A.2d 495, 499-501 (Del. 2007).[5]

To the extent that ambiguity exists regarding the generally understood meaning of burglary at the time of ACCA's enactment, the rule of lenity requires resolving the ambiguity in Quarles's favor. See, *e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Where, as here, "text, structure, and history fail to establish that the Government's position is unambiguously correct," the Court must resolve any "ambiguity in [the defendant's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); see also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978) ("doubts are resolved in favor of the defendant" (citation omitted)). Applying the rule of lenity here is particularly appropriate because deriving a "generic" definition of burglary from a survey of state laws is fraught with "significant challenges" because "[e]very state has its own statutory scheme, and the variation [among states] is enormous." Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 Ind. L. Rev. 629, 632 (2012).

Indeed, if this Court were to treat as "burglary" under ACCA state laws that reject such a fundamental component of the common-law offense as the contemporaneous-intent requirement, that would risk rendering ACCA's use of the term "burglary" profoundly, even unconstitutionally, vague. See generally

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[5] After *Dolan*, Delaware amended its burglary laws to provide that the intent to commit a crime "may be formed after the entry while the person remains unlawfully." 76 (pt. 2) Del. Laws 115 (2008) (codified at Del. Code Ann. tit. 11, § 829 (2019)).

Johnson v. *United States*, 135 S. Ct. 2551 (2015) (invalidating ACCA's residual clause as unconstitutionally vague). Given that only a small minority of states had rejected the contemporaneous-intent requirement at the time of ACCA's enactment, stripping that deep-rooted common-law element from the generic definition of burglary would "den[y] fair notice to defendants and invite[] arbitrary enforcement," *id.* at 2557, and would entail the type of unmoored judicial lawmaking against which the void-for-vagueness doctrine is aimed, see *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality op.); *id.* at 1227-1228 (Gorsuch, J., concurring); accord J.A. 103-104. This Court should reject the government's expansive conception of burglary to avoid those serious constitutional concerns. See, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 408-409 (2010) (rejecting interpretation that "would raise the due process concerns underlying the vagueness doctrine").

Summary Of State Burglary Laws As Of 1986

States With A Contemporaneous-Intent Requirement

Alaska: Alaska courts interpreted their state's burglary statute, which prohibited both unlawful entry and remaining in a building with intent to commit a crime therein, to require contemporaneous intent. See Alaska Stat. Ann. §§ 11.46.300, 11.46.310 (West 1995); *Shetters* v. *State*, 751 P.2d 31, 36 n.2 (Alaska Ct. App. 1988) (if defendant "did not have an intent [to commit a crime] at the time his presence on the premises first became unlawful, he could not be convicted of burglary" because "[t]he intent to commit a further crime must co-exist with the initial criminal trespass").

Arkansas: Arkansas's definition of burglary penalized a defendant who "enters or remains unlawfully." Ark. Code Ann. § 5-39-201 (1987). *Hickerson* v. *State*, 667 S.W.2d 654, 655-656 (Ark. 1984), reversed the burglary conviction of a defendant who unlawfully entered a home, kidnapped a minor from the home, and then raped her, because there was no evidence "that, at the time [the defendant] entered the house, he intended to commit a felony."

California: California law defined burglary as the entry (which need not be unlawful) of certain premises with contemporaneous intent "to commit grand or petit larceny or any felony." Cal. Penal Code § 459 (West 1988); see also 2 Witkin, Cal. Crim. Law 4th Crimes—Property § 147 (2012) ("The prosecution must prove that the entry was made with the specific intent 'to commit grand or petit larceny or any felony.'").

Colorado: In 1986, the Colorado burglary statute applied to those who "enter[] or remain[] unlawfully in a building or occupied structure with intent to" commit the requisite crimes. Colo. Rev. Stat. Ann. § 18-4-202 (West 1986); see also *id.* § 18-4-203. The defendant's intent had to "coexist with the initial point of unlawful entry or remaining." *Cooper* v. *People*, 973 P.2d 1234, 1240 (Colo. 1999) (en banc), abrogated on other grounds by *Griego* v. *People*, 19 P.3d 1 (Colo. 2001); see also *People* v. *Barnhart*, 638 P.2d 814, 816 (Colo. App. 1981) (burglary requires proof "that the accused entered the building with intent to commit a crime").[6]

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[6] In 1999, Colorado "legislatively overruled *Cooper* with respect to the intent element of burglary." *People* v. *Bondurant*, 296 P.3d 200, 214 (Colo. App. 2012). The legislature altered the statutory language to apply to those who "remain[] unlawfully *after a*

Connecticut: Although Connecticut recognized a "remaining in" theory of burglary liability, Conn. Gen. Stat. Ann. §§ 53a-101, 53a-102, 53a-103 (West Supp. 1985), Connecticut courts held that the "remaining in" theory applies only to defendants who entered a building lawfully and then remained in the building after their privilege to do so had ended. See *State* v. *Belton*, 461 A.2d 973, 976 (Conn. 1983); *State* v. *Edwards*, 524 A.2d 648, 653 (Conn. App. Ct. 1987). For defendants who entered a building unlawfully, the plain statutory language required proof of contemporaneous intent—*i.e.*, that the defendant "enter[ed] * * * unlawfully * * * with intent to commit a crime." Conn. Gen. Stat. Ann. §§ 53a-101, 53a-102, 53a-103 (West Supp. 1985).

Delaware: Knowingly entering or remaining unlawfully in a building with intent to commit a crime constituted burglary. Del. Code Ann. tit. 11, §§ 824-826 (1979). Based on the crime's common-law origins, the Delaware Supreme Court held in *Dolan* v. *State* that the statutory offense continued to require intent to commit a crime within the building at the time of the initial unlawful occupation. 925 A.2d 495, 501 (Del. 2007).[7]

District of Columbia: The D.C. burglary statute only prohibited "enter[ing]" premises "with intent to" commit a crime. D.C. Code § 22-1801 (1981). "Under

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lawful or unlawful entry." Ibid.; see also 1999 Colo. Sess. Laws 326, 327. While the prior statute required proof that the defendant intended to commit a crime "at the moment he first became a trespasser," the present-day provisions encompass those who form their intent later. *Bondurant*, 296 P.3d at 214 (quoting *Cooper*, 973 P.2d at 1240).

[7] But cf. note 5, *supra*.

[D.C.'s] burglary statute, the government must prove beyond a reasonable doubt that the defendant entered the premises having already formed an intent to commit a crime therein." *Warrick* v. *United States*, 528 A.2d 438, 442 (D.C. 1987) (citation omitted).

Hawaii: Hawaii's statutes defined burglary as the intentional and unlawful entry or remaining in a building with intent to commit a crime against a person or property rights. Haw. Rev. Stat. §§ 708-810, 708-811 (1985). The Hawaii Supreme Court has held that "[i]t would be an unwarranted extension" of the statutes "to expand the offense of burglary to include situations in which the criminal intent develops *after* an unlawful entry or remaining has occurred." *State* v. *Mahoe*, 972 P.2d 287, 291 (Haw. 1998).

Idaho: Idaho's burglary statute, first adopted in 1972, prohibited any entry, whether or not it was unlawful, of certain premises with intent to commit any theft or felony. Idaho Code Ann. § 18-1401 (1987). The Idaho courts required the defendant to have formed the criminal intent by the time of entry. See *Matthews* v. *State*, 741 P.2d 370, 373 (Idaho Ct. App. 1987) (burglary requires that "defendant conceived of the crime before entering the premises"); *State* v. *Matthews*, 700 P.2d 104, 106 (Idaho Ct. App. 1985) ("Burglary * * * requires entry into a building with the intent, at that time, to commit theft or a felony.").

Illinois: Burglary applied to a person who "without authority, [k]nowingly enters or without authority remains within a building * * * with intent to commit therein a felony or theft." 720 Ill. Comp. Stat. Ann. 5/19-1(a) (West 1993); see also Public Act 82-238, 1981 Ill. Laws 1275, 1275-1276. "Entry" burglaries

required contemporaneous intent. *E.g.*, *People* v. *Tackett*, 414 N.E.2d 748, 749-750 (Ill. App. Ct. 1980). Although one intermediate appellate court suggested in dicta that "remains within" burglary did not require contemporaneous intent, see *People* v. *Boose*, 487 N.E.2d 1088, 1091 (Ill. App. Ct. 1985), the weight of case law was to the contrary at the time of ACCA's enactment. The Illinois Supreme Court had stated flatly, at a time when the burglary statute had entry and remaining variants, that "[a] criminal intent formulated after a lawful entry will not satisfy the statute." *People* v. *Wea[illegible]*, 243 N.E.2d 245, 248 (Ill. 1968). And the Court of A[illegible]eals characterized the "remaining in" variant as "aimed at a situation where a defendant lawfully enters a building and then conceals himself *with the intent to commit a felony*." *People* v. *Green*, 404 N.E.2d 930, 932 (Ill. App. Ct. 1980). In 2016, the Illinois Supreme Court confirmed that "burglary by remaining includes situations in which an individual enters a public building lawfully, but, *in order to commit a theft or felony*, (1) hides and waits for the building to close, (2) enters unauthorized areas within the building, or (3) continues to remain on the premises after his authority is explicitly revoked." *People* v. *Bradford*, 50 N.E.3d 1112, 1120 (Ill. 2016) (emphasis added) (citations omitted).[8]

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[8] In characterizing Illinois as lacking a contemporaneous intent requirement, see *Bernel-Aveja*, 844 F.3d at 236 n.125 (Owen, J., concurring), Judge Owen cited the dicta from *Boose*, a case where the "State chose to charge [only] * * * burglary by illegal entry," 487 N.E.2d at 1090. At the time of ACCA's enactment, Illinois courts also recognized a "limited authority" doctrine, under which authority to be present in a structure (*e.g.*, a store during business hours) was deemed revoked when a defendant formed the intent

Indiana: Only by breaking and entering "in conjunction with" an intention to commit a felony "at the moment of entry," could an individual be convicted of burglary. *Bonds* v. *State*, 436 N.E.2d 295, 297 (Ind. 1982); see also Ind. Code Ann. § 35-43-2-1 (LexisNexis 1985). Arguing, for example, that a defendant had "entered [a] trailer simply because he was * * * seeking shelter" could absolve him of a burglary conviction, though he subsequently committed a felony within the trailer. See *Garcia* v. *State*, 463 N.E.2d 1099, 1101 (Ind. 1984).

Louisiana: Louisiana's 1986 burglary statutes did not include any "remaining in" language; they only encompassed unauthorized entry. See La. Stat. Ann. §§ 14:60, 14:62 (1986). Courts required intent to be contemporaneous with unlawful entry. See *State* v. *Jones*, 426 So. 2d 1323, 1325 (La. 1983) ("The defendant must have had the specific intent to commit either a felony or a theft at the time of his unauthorized entry.").

Maine: Anyone who "enters or surreptitiously remains in a structure, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein," commits burglary. Me. Rev. Stat. Ann. tit. 17-A, § 401(1) (1983). It was "an essential element of burglary * * * that at the time defendant makes an unauthorized entry into a building defendant *must then* entertain actual intent to commit a specific crime" therein. *State* v. *Field*, 379 A.2d 393, 395 (Me. 1977)

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to commit a crime, on the theory that an owner only holds a building open for lawful purposes. *Weaver*, 243 N.E.2d at 248. That doctrine is consistent with a contemporaneous-intent requirement, since the moment of first unlawful remaining in a public space necessarily coincided with the defendant's formation of criminal intent.

(emphasis added). The statutory sentencing provision underscored that "remaining in" was a discrete time of initial unauthorized presence, not a continuous state: "[a] person may be convicted both of burglary and of the crime which he committed or attempted to commit *after* entering or *remaining in* the structure." Me. Rev. Stat. Ann. tit. 17-A, § 401(3) (1983) (emphases added).[9]

Maryland: Burglary required breaking and entering with contemporaneous intent to commit a crime. See *Reed* v. *State*, 560 A.2d 1104, 1106 (Md. 1989) ("burglary" requires intent to commit a crime "at the time of the breaking"). Breaking and entering absent intent was separately defined as a misdemeanor. Md. Code Ann. art. 27, §§ 29-31B (Michie 1982 & Supp. 1987).[10]

Massachusetts: Burglary statutes uniformly required entry with intent to commit a crime. Mass. Gen. Laws Ann. ch. 266, §§ 14, 15, 16, 16A, 17, 18 (West 1970). "In the lexicon of Massachusetts crimes there [was] no such crime as 'breaking and entering' unaccompanied by intent to commit a felony or a

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[9] In 1999, the Maine legislature codified a separate crime of "aggravated criminal trespass," applicable to any person who, without authority, "enters a dwelling place and * * * [w]hile in the dwelling place violates [certain] provision[s] of [the criminal laws]." Me. Rev. Stat. Ann. tit. 17-A, § 402-A (2005); see also 1999 Me. Laws 788. The contrast between this language and the burglary statute supports a contemporaneous-intent requirement for "remaining in" burglary.

[10] Modern-day Maryland burglary statutes require intent for first, second, and third-degree offenses. Md. Code Ann., Crim. Law §§ 6-202, 6-203, 6-204 (LexisNexis 2019). Fourth-degree burglary covers breaking and entering absent intent, presence on certain premises with criminal intent, and possession of burglar's tools. *Id.* § 6-205(a)-(d).

misdemeanor." *Commonwealth* v. *Vinnicombe*, 549 N.E.2d 1137, 1138 (Mass. App. Ct. 1990).[11]

Michigan: Separate provisions criminalized "break[ing] and enter[ing]" certain structures with intent to commit a felony or larceny therein, on the one hand, and "[e]ntering without breaking" those structures with the same intent, on the other; neither provision spoke to unlawful remaining. Mich. Comp. Laws §§ 750.110, 750.111 (1968). "[W]hoever [entered]" must have "entertained *at the time* a felonious intent." *People* v. *Barron*, 163 N.W.2d 219, 221 (Mich. 1968) (emphasis added).[12]

Minnesota: Anyone who "enter[ed] a building without consent and with intent to commit a crime," Minn. Stat. § 609.582 (Supp. 1983), committed burglary. The statute defined "enters without consent" to include "remain[ing] within a building without the consent of the person in lawful possession," *id.* § 609.581, subd. 4(c). "[I]t is necessary that the defendant had the intent to commit that crime at the time that the defendant either entered or remained in the building. Whether the defendant intended to commit the crime must be determined from all the circumstances, including, the manner and time of entry or remaining in the building." *State* v. *Hanson*, No. A06-567, 2007 WL 2177334, at *3 (Minn. Ct. App. July 31, 2007) (citation omitted); cf. *State* v. *Nelson*, 523 N.W.2d 667, 669-670 (Minn. Ct.

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[11] In 1998, the Massachusetts legislature enacted a new provision criminalizing entering "by false pretenses," including entering by such and committing a larceny, without specifically requiring the intent to commit that larceny exist at the time of entry. 1998 Mass. Acts 1376 (codified at Mass. Gen. Laws ch. 266, § 18A (2017)).

[12] For legislative changes in Michigan, see pp. 9-10, *supra*.

App. 1994) (treating "remain[ing] within a building" as fixed point in time rather than continuous state, for purposes of deciding degree of burglary).[13]

Mississippi: Mississippi's 1986 burglary statutes criminalized breaking and entering with intent to commit a crime. See Miss. Code. Ann. §§ 97-17-19, 97-17-21, 97-17-23, 97-17-27, 97-17-29, 97-17-33, 97-17-37 (1994). Mississippi courts have held that intent must be concurrent with unlawful entry. See, *e.g.*, *Davis* v. *State*, 611 So. 2d 906, 911 (Miss. 1992) (holding that at the moment of unlawful entry, "it is necessary * * * to show * * * inten[t] to commit a crime therein"); *Harper* v. *State*, 478 So. 2d 1017, 1021 (Miss. 1985) (same).

Missouri: Missouri's burglary statutes criminalized "knowingly enter[ing] unlawfully or knowingly remain[ing] unlawfully in a building * * * for the purpose of committing an offense therein." Mo. Rev. Stat. §§ 569.160.1, 569.170.1 (West 1979). That the legislature specified that "remaining" must be "for the *purpose* of committing an offense therein," *ibid.* (emphasis added)—in other words, must be with the "conscious object to" commit a crime, *id.* § 562.016.2—suggests that the intent to commit a crime must be the catalyst for the decision to remain, rather than a byproduct of opportunity. That reading is confirmed by the legislative committee comments to the 1973 proposed code, which emphasized that "[t]he essence of burglary has traditionally been an unauthorized intrusion *plus a purpose to commit some type of crime*"; while "the Committee decided to replace the concept of 'breaking' with

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[13] Minnesota later expanded its burglary statute to prohibit "enter[ing] a building without consent and commit[ting] a crime" therein. 1988 Minn. Laws 1649, 1654.

that of 'entering or remaining unlawfully,'" it gave no indication of abandoning the traditional element that intent must accompany the unauthorized intrusion.[14] Mo. Ann. Stat. § 569.170, Comment to 1973 Proposed Code (West 1979) (emphasis added).

Montana: Montana's 1986 burglary statute required that the defendant have unlawfully entered or remained in an occupied structure "with the purpose to commit an offense therein." Mont. Code Ann. § 45-6-204 (1987). Several Montana Supreme Court decisions indicate that intent was required at the moment of unlawful entry or first unlawful remaining in. See, *e.g.*, *State* v. *Courville*, 769 P.2d 44, 47-48 (Mont. 1989); *State* v. *Manthie*, 641 P.2d 454, 456 (Mont. 1982).[15]

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[14] Though Judge Owen cites a stray remark from the Missouri Court of Appeals (postdating ACCA) to reach a different conclusion, see *Bernel-Aveja*, 844 F.3d at 235 & n.130 (Owen, J., concurring) (citing *State* v. *Rollins*, 882 S.W.2d 314, 317-318 (1994)), the reliance is unwarranted. *Rollins* never discussed the intent to commit a crime; the quoted language appears in the context of the court's rejection of the contention that without "evidence that [the] victim unequivocally withdrew any license to remain," the prosecution could not show that the defendant knowingly remained unlawfully. 882 S.W.2d at 317.

[15] In 2009, the Montana legislature amended the burglary statute to expand the definition of burglary to include situations in which a defendant knowingly "enters or remains unlawfully in an occupied structure" and commits an offense in that structure. See Mont. Code Ann. § 45-6-204(1)(b) (2017); see also *State* v. *Tellegen*, 314 P.3d 902, 906 (Mont. 2013) ("burglary is committed when a person unlawfully enters a structure and commits an offense therein"). That the Montana legislature felt the need to amend the statute in this manner bolsters the conclusion that Montana law *did* require contemporaneous intent before 2009.

Nebraska: Since 1977, Nebraska's burglary statute has required that the prosecution establish the defendant intended to commit an enumerated crime "*when* he broke and entered." *United States* v. *Richards*, No. 13-cr-371, 2014 WL 6686783, at *11 (D. Neb. Nov. 26, 2014) (emphasis added) (citing *State* v. *Burdette*, 611 N.W.2d 615, 629 (Neb. 2000)); see Neb. Rev. Stat. § 28-507 (1985).

Nevada: In 1986, Nevada law defined burglary as any entry "with intent to commit grand or petit larceny, or any felony." Nev. Rev. Stat. Ann. § 205.060(1) (Michie 1986). It did not provide for a crime of burglary based on unlawful remaining. And it required that the defendant possess the requisite intent at the time of entry. *State* v. *Adams*, 581 P.2d 868, 869 (Nev. 1978) ("A criminal intent formulated after * * * entry will not satisfy the statute.").

New Hampshire: New Hampshire's burglary statute required unprivileged entry into a building with contemporaneous criminal intent. N.H. Rev. Stat. Ann. § 635:1 (Supp. 1986); see also *State* v. *Reardon*, 431 A.2d 796, 798 (N.H. 1981) (per curiam) (intent "at the time he entered"). Unlicensed or unprivileged entering or remaining, absent criminal intent, was classified separately in § 635:2 as criminal trespass.[16]

New Jersey: In 1986, a person was guilty of burglary if "with purpose to commit an offense therein he: (1) [e]nters * * * or (2) [s]urreptitiously remains" in a

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[16] In 2014, the burglary statute was amended to include entering or remaining unlawfully with the purpose to commit a crime. 2014 N.H. Laws 171, 173. The criminal trespass provision still separately addresses unlawfully entering or remaining without intent. N.H. Rev. Stat. Ann. § 635:2 (LexisNexis 2018).

structure without authorization. N.J. Stat. Ann. § 2C:18-2(a) (West 1982). New Jersey courts interpreted both variants as requiring contemporaneous intent. *E.g.*, *State* v. *Pyron*, 495 A.2d 467, 468 (N.J. Super. Ct. App. Div. 1985) ("An essential element of N.J.S.A. 2C:18-2(a)(1) burglary is unlawfully entering a structure for the purpose of committing an offense once inside."). *State* v. *Nieves*, A-2010-11T4, 2014 WL 886810, at *3 (N.J. Super. Ct. App. Div. Mar. 7, 2014), held that "a conviction for burglary requires proof that the defendant has an ulterior purpose or objective—committing 'an offense therein'—when the defendant engages in the proscribed conduct," *i.e.*, when he "enters or surreptitiously remains in a structure." "The temporal congruence of the proscribed conduct and the purpose to commit a crime in the structure is critical." *Ibid.*

New Mexico: New Mexico defined burglary as the "unauthorized entry" of a structure "with intent to commit any felony or theft therein." N.M. Stat. Ann. § 30-16-3 (Michie Supp. 1984); see also *State* v. *Jennings*, 691 P.2d 882, 885 (N.M. Ct. App. 1984) (burglary "requires an unauthorized entry with the intent to commit any felony or theft").

New York: New York's burglary statutes, which have not been amended since 1981, apply to anyone who "knowingly enters or remains unlawfully in a [building or dwelling] with intent to commit a crime therein." N.Y. Penal Law §§ 140.20-140.30 (McKinney 2019). The New York Court of Appeals has held that "contemporaneous intent is required" under both the "entry" and "remaining" prongs of the statutes. *People* v. *Gaines*, 546 N.E.2d 913, 915-916 (N.Y. 1989).

North Carolina: North Carolina's principal burglary statute, N.C. Gen. Stat. § 14-51 (1993), required proof of contemporaneous intent. See, *e.g.*, *State* v. *Peacock*, 330 S.E.2d 190, 193 (N.C. 1985) ("A breaking or entering into a building without the intent to commit a felony is not converted into burglary by the subsequent commission therein of a felony subsequently conceived." (citation omitted)).

North Dakota: Since 1973, North Dakota's burglary statute has criminalized "willfully enter[ing] or surreptitiously remain[ing] in a building or occupied structure * * * , when at the time the premises are not open to the public and the actor is not licensed, invited or otherwise privileged to enter or remain * * * , with intent to commit a crime therein." N.D. Cent. Code § 12.1-22-02(1) (2012). Although North Dakota courts have not addressed the contemporaneous-intent issue with respect to the "surreptitiously remain[ing]" prong, see *Bernel-Aveja*, 844 F.3d at 240 (Owen, J., concurring), they have made clear that defendants charged with unlawful entry must have intended to commit a crime at the time of the entry, see *State* v. *One 1990 Chevrolet Pickup*, 523 N.W.2d 389, 395 (N.D. 1994) (no burglary if defendant committed theft after entering home "only out of curiosity and without intent to steal"); *State* v. *Arne*, 311 N.W.2d 186, 189 (N.D. 1981) (emphasizing in affirming burglary conviction that "[t]here was an intent to commit the crime at the time the building was entered").

Oklahoma: The burglary statutes prohibited only "break[ing]" and "enter[ing]" with criminal intent and made no mention of "remaining in." Okla. Stat. Ann. tit. 21, §§ 1431, 1435 (West 1983). Oklahoma courts confirmed that a defendant must "have the requisite

criminal intent at the time of unlawful entry." *Worchester* v. *State*, 536 P.2d 995, 998 (Okla. Crim. App. 1975).

Pennsylvania: Burglary required unlicensed or unprivileged entrance with the intent to commit a crime. 18 Pa. Stat. and Cons. Ann. § 3502 (West 1983). It was clear by 1986 that "to be convicted of burglary, the defendant must have formed the intent to commit a crime when he entered * * * , not after he entered." *Commonwealth* v. *Russell*, 460 A.2d 316, 321 (Pa. Super. Ct. 1983); see also *Commonwealth* v. *Gonzales*, 443 A.2d 301, 304 (Pa. Super. Ct. 1982) (burglary requires "contemporaneous intent * * * of committing a crime" at time of entry).

Rhode Island: "In Rhode Island the burglary statute, § 11-8-1, incorporate[d] the common-law definition of that crime," which requires breaking and entering with intent to commit a crime. *State* v. *O'Rourke*, 399 A.2d 1237, 1238 (R.I. 1979); see also 11 R.I. Gen. Laws § 11-8-1 (1981). Deviations from the common-law crime were separately codified, including provisions criminalizing the mere act of "breaking and entering," without either intent to commit another crime or subsequent commission of another crime. *E.g.*, 11 R.I. Gen. Laws §§ 11-8-2, 11-8-5.1 (1981).

South Carolina: South Carolina's 1986 burglary statutes required "enter[ing]" a dwelling or building "with intent to commit a crime" therein. S.C. Code Ann. §§ 16-11-311, 16-11-312, 16-11-313 (2003); 1985 S.C. Acts 604-605. South Carolina courts have consistently required that intent be concurrent with entry. See, *e.g.*, *State* v. *Howard*, 42 S.E. 173, 175 (S.C. 1902) ("[T]o justify a [burglary] conviction * * * , the jury

ought to be satisfied by the evidence, beyond a reasonable doubt, that the intent to rob existed when the house was entered, not formed afterward" (citation omitted)); *State* v. *Gilliland*, 741 S.E.2d 521, 526 (S.C. Ct. App. 2012) ("[T]he intent to commit a crime must exist at the time the accused enters.").

Tennessee: In 1986, Tennessee's burglary statutes required proof of "breaking and entering" with the "intent to commit a felony." Tenn. Code Ann. §§ 39-3-401(a), 39-3-403(a), 39-3-404(a)(1) (1982 & Supp. 1986).[17]

Vermont: In 1986, Vermont's burglary statute provided that a "person is guilty of burglary if he enters any building or structure * * * with the intent to commit" a listed crime. Vt. Stat. Ann. tit. 13, § 1201 (1989).[18]

Virginia: Virginia's burglary statutes required entry with contemporaneous intent to commit a crime. See Va. Code Ann. §§ 18.2-89, 18.2-90, 18.2-91, 18.2-92 (1988); see also *Jones* v. *Commonwealth*, 687 S.E.2d

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[17] As part of a general revision of its criminal code, Tennessee amended and consolidated its burglary laws in 1989. See 1989 Tenn. Pub. Acts 1223 (codified as amended at Tenn. Code Ann. § 39-14-402).

[18] Vermont's burglary statute does "not apply to a licensed or privileged entry, or to an entry that takes place while the premises are open to the public, unless the person, with the intent to commit a crime specified in this subsection, surreptitiously remains" inside after the license expires or the premises are closed. Vt. Stat. Ann. tit. 13, § 1201 (1989). Regardless, the statute required criminal intent at the time of entry. See *Bernel-Aveja*, 844 F.3d at 237-238 (Owen, J., concurring) (materially identical contemporary Vermont statute "provides that intent to commit a crime on the premises must be present at the time of unlawful entry or at the time of lawful entry").

738, 740 (Va. 2010) ("To sustain the statutory burglary conviction the Commonwealth was required to prove that at the time [the defendant] entered the apartment he intended to commit an assault and battery."); *Scott* v. *Commonwealth*, 323 S.E.2d 572, 574-575 & n.1 (Va. 1984) (similar).

West Virginia: West Virginia limited burglary to "enter[ing] * * * with intent to commit a felony or any larceny therein." W. Va. Code Ann. § 61-3-11 (1984). Criminal intent must be contemporaneous with entry. *State* v. *McCormick*, 277 S.E.2d 629 (W. Va. 1981) (per curiam), is instructive. There, the court concluded that in a prosecution under a closely related breaking-and-entering law (see W. Va. Code Ann. § 61-3-12 (1991)), it was reversible error to "t[ell] the jury that if they believed * * * the defendant broke and entered * * * and committed a larceny therein, then he is presumed to have entered with the intent to commit larceny." 277 S.E.2d at 631-632.

Wisconsin: Burglary applied to those who "intentionally enter[ed]" certain structures without consent "and with intent to steal or commit a felony in such place." Wis. Stat. § 943.10 (1982). "[E]ntry" was defined to "include[] the idea of presence within" a building. *Levesque* v. *State*, 217 N.W.2d 317, 318 (Wis. 1974). But to constitute burglary, "[c]on-currently with the entry [the defendant] must have the intention to steal or commit a felony." *Id.* at 319. For instance, where a defendant claimed "he entered [a] tavern during open hours, drank too much and passed out in the men's room, and then, after awakening while the tavern was closed, he formed the intent to steal," the Court of Appeals held that "if he did not form the requisite intent to steal until he awoke inside the tavern,

the offense of theft, not burglary, was committed because the intent to steal was not formed prior to or at the time of entry." *State* v. *Cosby*, 321 N.W.2d 365 (Wis. Ct. App. 1982) (unpub.).[19]

States Lacking A Contemporaneous-Intent Requirement

Alabama: The Alabama Court of Criminal Appeals interpreted Alabama's burglary statutes, Ala. Code §§ 13A-7-5, 13A-7-6, 13A-7-7 (LexisNexis 1994), as encompassing cases where "the intent to commit a crime" is "formed after the entry and while the accused remains unlawfully." *Gratton* v. *State*, 456 So. 2d 865, 872 (Ala. Crim. App. 1984).

Arizona: In 1986, Arizona defined burglary as "entering or remaining unlawfully in or on" a structure "with the intent to commit any theft or any felony therein." Ariz. Rev. Stat. Ann. §§ 13-1506, 13-1507, 13-1508 (1989). The Arizona courts held that the statutes did not require proof of contemporaneous intent. See *State* v. *Embree*, 633 P.2d 1057, 1059 (Ariz. Ct. App. 1981); see also *State* v. *Belcher*, 776 P.2d 811, 812 (Ariz. Ct. App. 1989).

Florida: Florida's 1986 definition of burglary penalized unlicensed "entering or remaining * * * with the intent to commit an offense." Fla. Stat. § 810.02 (West 1994). Florida courts do not appear to have squarely addressed the contemporaneous-intent issue at the time of ACCA's enactment. They did recognize that even where a victim had initially consented to the

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[19] Cf. *Champlin* v. *State*, 267 N.W.2d 295, 299 (Wis. 1978) (reversing burglary conviction where defendant entered with intent to steal from hotel lobby that was open to the public; rejecting state's broad reading of "dicta" from *Levesque*).

defendant's presence in a building, the victim's resisting the defendant's assault "ma[de] his remaining in the premises after the withdrawal [of consent] a burglary." *Ray* v. *State*, 522 So. 2d 963, 966-967 (Fla. Dist. Ct. App. 1988), abrogated in part by *Delgado* v. *State*, 776 So. 2d 233 (Fla. 2000). Courts later indicated intent could occur after the time of first unlawful remaining. *Braddy* v. *State*, 111 So. 3d 810, 844 (Fla. 2012) (per curiam).

Georgia: Burglary covered a defendant who unlawfully "enters or remains" with requisite intent. Ga. Code Ann. § 16-7-1 (1988). Georgia courts have held that intent does not need to be concurrent with unlawful entry. See, *e.g.*, *Hewatt* v. *State*, 455 S.E.2d 104, 106 (Ga. Ct. App. 1995); *Keith* v. *State*, 225 S.E.2d 719, 720 (Ga. Ct. App. 1976).

Iowa: Iowa's prohibition on unlawfully "remain[ing]" within "an occupied structure" with intent to commit a crime, Iowa Code § 713.1 (1979), was thought by leading commentators to allow for formation of such intent after the initial moment of unlawful presence, see John L. Yeager & Ronald L. Carson, 4 Iowa Practice, *Criminal Law & Procedure* § 294 (1979), and the state's Supreme Court later adopted that understanding, *State* v. *Dible*, 538 N.W.2d 267, 271 (Iowa 1995).

Kansas: Burglary occurred when a person "knowingly and without authority enter[ed] into or remain[ed] within" a building "with intent to commit a felony" therein, Kan. Stat. Ann. § 21-3715 (1981), whether the intent was formed before or after the unlawful entry or initial moment of unlawful presence, *State* v. *Mogenson*, 701 P.2d 1339, 1343-1345 (Kan. Ct.

App. 1985); accord *State* v. *Gutierrez*, 172 P.3d 18, 23 (Kan. 2007).

South Dakota: South Dakota's burglary statute covered both unlawfully "enter[ing]" and "remain[ing] in an occupied structure," "with intent to commit any crime" therein. S.D. Codified Laws §§ 22-32-1, 22-32-3 (1988); 1976 S.D. Sess. Laws ch. 158 §§ 32-1, 32-2, at 273-274. The South Dakota Supreme Court has stated that the burglary statute is satisfied if "the person remain[s] in the structure after forming the intent to commit a crime." *State* v. *DeNoyer*, 541 N.W.2d 725, 732 (S.D. 1995).

Texas: The 1986 burglary statute encompassed not just entry with intent to commit a felony or theft, but also "remain[ing] concealed, with intent to commit a felony," Tex. Penal Code Ann. § 30.02(a)(2) (West 1974), and it eschewed the intent requirement altogether for anyone who enters a building "and commits or attempts to commit a felony or theft," *id.* § 30.02(a)(3). Thus, when a defendant did have intent to commit a felony, it did not need to be concurrent with entry. See *Day* v. *State*, 532 S.W.2d 302, 305-306 (Tex. Crim. App. 1976) (no intent required for § 30.02(a)(3)); *Espinoza* v. *State*, 955 S.W.2d 108, 111 (Tex. App. 1997) (similar).

Washington: Washington's burglary statute applied to one who, "with intent to commit a crime against a person or property therein, * * * enters or remains unlawfully in a [covered structure]." Wash. Rev. Code. Ann. §§ 9A.52.020, 9A.52.030 (West 1988). The Washington Court of Appeals first addressed the issue of contemporaneous intent in 2005, holding that unlawful remaining is a continuous status, not a

discrete event; thus, a defendant can develop the requisite intent at any point while unlawfully present in a building. *State* v. *Allen*, 110 P.3d 849, 853-854 (Wash. Ct. App. 2005).

States With Ambiguous Laws

Kentucky: Burglary applied to a person who "with the intent to commit a crime, * * * knowingly enters or remains unlawfully in a building." Ky. Rev. Stat. Ann. § 511.020 (LexisNexis 1984). Consistent with retaining a contemporaneous-intent requirement, in 1986, the Supreme Court of Kentucky held, in vacating a burglary conviction, that even where a defendant "knowingly entered and unlawfully remained in the victim's apartment," if "he had no intent to commit a crime when he entered the room," he would be "guilty of criminal trespass only." *McClellan* v. *Commonwealth*, 715 S.W.2d 464, 466-467 (Ky. 1986).[20]

Ohio: In 1986, it would have been unclear to Congress whether Ohio required contemporaneous intent. Burglary was defined to mean that "[n]o person by force, stealth or deception, shall trespass in an occupied structure * * * with purpose to commit therein any [covered offense]." Ohio Rev. Code Ann. § 2911.12 (West 1985). As of 1986, state appellate courts had diverged on whether "the intent with which a person forcibly trespasses in an occupied structure is that which he had in mind at the time of the entry, not one which

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[20] In 1993, the Supreme Court of Kentucky held that a defendant who unlawfully entered a dwelling could "subsequently form[] the intent necessary to be guilty of the crime of burglary." *McCarthy* v. *Commonwealth*, 867 S.W.2d 469, 471 (Ky. 1993), abrogated on other grounds by *Lawson* v. *Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

he may have formed later," *State* v. *Flowers*, 475 N.E.2d 790, 792 (Ohio Ct. App. 1984), or whether "the 'purpose to commit a felony' element * * * may legally be formed while the trespass is in progress," *State* v. *Jones*, 440 N.E.2d 580, 581 (Ohio Ct. App. 1981).[21]

Oregon: Burglary applied to anyone who "enters or remains unlawfully in a building with intent to commit a crime therein." Or. Rev. Stat. Ann. §§ 164.215, 164.225 (West 1987). Although a single decision of the Oregon Court of Appeals appeared to suggest that contemporaneous intent was not required, *State* v. *Papineau*, 630 P.2d 904, 907 (Or. App. Ct. 1981), that court later clarified that "the proper focus is on the defendant's intent at the initiation of the trespass," *In re J.N.S.*, 308 P.3d 1112, 1118 (Or. Ct. App. 2013); see also *ibid.* (reading *Papineau* as not eliminating requirement of contemporaneous intent, and stating that, insofar as *Papineau* "can be read to suggest that a person can be convicted of burglary for unlawfully entering a building and thereafter forming intent to commit a crime therein," that suggestion was inconsistent with the Oregon Supreme Court's subsequent interpretation of the burglary statute). The Oregon Supreme Court has not directly addressed the question, but the Court of Appeals recently reaffirmed that the state's burglary statute, which remains substantially the same as in 1986, requires that the defendant have formed the requisite criminal intent at the moment of unlawful entry or first unlawful remaining.

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[21] Not until 2000 would the Ohio Supreme Court clarify, in *State* v. *Fontes*, 721 N.E.2d 1037, 1040 (Ohio 2000), that the Ohio burglary statute's use of the term "trespass" refers to a continual act, allowing intent to be formed at any time while trespassing.

See *State* v. *McKnight*, 426 P.3d 669, 673 (Or. Ct. App. 2018).

Utah: Utah's burglary statute, enacted in 1973, proscribed entering or remaining unlawfully in any building or portion thereof with intent to commit a felony, theft, or assault. Utah Code Ann. § 76-6-202 (LexisNexis 1990). As of 1986, the Utah courts had not addressed whether contemporaneous intent was required under the statute.[22]

Wyoming: Wyoming defined burglary as entering or remaining in certain structures with intent to commit theft or a felony therein. Wyo. Stat. Ann. § 6-3-301 (LexisNexis 1986). But as of 1986, the Wyoming courts had not addressed when the defendant must have formed the criminal intent. See *Bernel-Aveja*, 844 F.3d at 240 (Owen, J., concurring) (noting that it is "unclear" what Wyoming's burglary statute "require[s] regarding the timing of intent because the state courts have not yet addressed the question").

III. A CONTEMPORANEOUS-INTENT REQUIREMENT SERVES CONGRESS'S PURPOSE OF RESERVING ENHANCED PENALTIES FOR DANGEROUS CAREER CRIMINALS

Recognizing a contemporaneous-intent requirement would be consistent with ACCA's purpose of imposing enhanced penalties on "a small number" of dangerous career criminals. *Taylor*, 495 U.S. at 583. By

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[22] Noting that the issue was "one of first impression," the Utah Supreme Court in 1998 held that contemporaneous intent is not required, as a defendant's continued unlawful presence in a structure satisfies the unlawful remaining element of burglary. See *State* v. *Rudolph*, 970 P.2d 1221, 1228-1229 (Utah 1998).

contrast, it would conflict with Congress's objectives to inflict ACCA's harsh mandatory minimum on individuals with prior convictions for committing unplanned crimes of opportunity while trespassing.

Congress's use of the word "career" in the title of the "Armed *Career* Criminal Act" is meaningful. See *Begay*, 553 U.S. at 146 (ACCA's title "not merely decorative" (citation omitted)). As *Taylor* explained after extensively reviewing ACCA's legislative history, "Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes *as their means of livelihood*, and who, because they possess weapons, present at least a potential threat of harm to persons." 495 U.S. at 587-588 (emphasis added).

Individuals who commit spur-of-the-moment crimes of opportunity during a trespass do not fit that description. Given the absence of advance planning, it cannot reasonably be said that such individuals "make a full-time career" out of burglary. *Taylor*, 495 U.S. at 584 (quoting Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcommittee on Crime of the House Committee on the Judiciary, 99th Cong., 2d Sess. 12 (1986) (statement of Rep. Wyden) (House Hearing)); see also House Hearing 26 (statement of Deputy Assistant Attorney General James Knapp) (describing burglary as "probably the No. 1 professional crime"). Nor are such spontaneous offenses likely to reflect a "profit motive" that could be deterred through enhanced penalties. *Taylor*, 495 U.S. at 585 (quoting House Hearing 38 (statement of Bruce Lyons, President-elect of National Association of Criminal Defense Lawyers)). To the contrary, the government would brand as an armed career criminal

a homeless person with a handful of convictions for stealing food or clothing after seeking shelter in unoccupied commercial buildings on cold winter nights. Cf. *Gaines*, 546 N.E.2d at 914.

Furthermore, individuals with prior convictions from committing crimes of opportunity while trespassing do not present the increased "threat of harm to persons" that ACCA seeks to address. *Taylor*, 495 U.S. at 587-588; see also *Begay*, 553 U.S. at 146 (ACCA "focuses upon the special danger created when a particular type of offender * * * possesses a gun"). "Congress singled out burglary * * * because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588; see also H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) ("The Subcommittee agreed to add the crimes * * * that involve conduct that presents a serious potential risk of physical injury to others * * * such as burglary."). *Taylor* recognized that contemporaneous intent is closely tied to the risk of violence because "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation between the offender and an occupant." 495 U.S. at 588 (emphasis added). An offender with contemporaneous intent generally acts with some amount of premeditation, increasing the likelihood that he will be "prepared to use violence if necessary to carry out his plans or to escape." *Ibid.*

Therefore, an individual with a history of carrying out pre-planned burglaries is more likely to be the type of dangerous offender at which ACCA is aimed—*i.e.*, the kind of person likely to "use [a] gun deliberately to harm a victim." *Begay*, 553 U.S. at 145. But the same cannot reasonably be said of the homeless person who commits a crime of opportunity after entering an

unoccupied building for no other reason than to escape from the cold. That is not "purposeful, violent, and aggressive" conduct indicating that "the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 145-146; see also *Herrold*, 883 F.3d at 534 ("Scenarios in which a defendant trespasses but does not intend to commit a crime must engender less risk of confrontation than ones in which he enters *just to commit a crime.*").

The entire rationale for defining burglary as a separate offense collapses if the crime sweeps as broadly as the government claims. As explained above, see pp. 21-22, *supra*, "burglary is by hypothesis an attempt to commit some other crime" and was used at common law because of the difficulty of punishing inchoate offenses. Model Penal Code § 221.1, commentary, pp. 62-63 (1980). Because modern criminal law has largely abandoned rigid limits on criminal attempt, burglary is only justifiable as an independent offense if it is limited to conduct that creates more danger than the underlying crime. The existence of criminal intent at the time of unlawful entry or initial unlawful remaining is a key factor that "creates the possibility of a violent confrontation." *Taylor*, 495 U.S. at 588; cf. Model Penal Code § 221.1, commentary, p. 63 (1980) ("[E]ntry into a home at night in order to commit a theft is surely a more aggravated offense than an attempted theft alone, because of the additional element of personal danger that attends such conduct.").

"The ultimate absurdity," according to the Model Penal Code's authors, would be a "provision * * * making it burglary to commit an offense 'in' a building, regardless of the lawfulness of the actor's entry or *the intent with which he entered.*" Model Penal Code

§ 221.1, commentary, p. 65 (1980) (emphasis added). Michigan's third-degree home invasion statute allows for such an "ultimate absurdity" because it does not require that criminal intent accompany the initial act of unlawful occupation. Instead, it merely requires the prosecution to establish that the defendant "commit[ted] a misdemeanor" while "present in" a dwelling entered "without permission." Mich. Comp. Laws § 750.110a(4)(a).

Accordingly, by counting Quarles's third-degree home invasion conviction as an ACCA predicate, the decision below pushes ACCA beyond its logical limits. The Sixth Circuit held that generic burglary "allows for the development of intent at any point" while a defendant unlawfully remains within a structure. Pet. App. 7a. Under that rule, a 15-year mandatory minimum could apply not only to the homeless person who sleeps in a warehouse and steals a coat on his way out, but also to the "teenagers who unlawfully enter a house only to party, and only later decide to" steal from the house, *United States* v. *Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007); the hiker who seeks shelter from the snow in an unoccupied cabin and then takes food; and the defendant who enters a neighbor's home for a glass of water after having been hired to mow her lawn, and then pockets jewelry sitting near the sink, cf. *State* v. *Wesemann*, No. 03C01-9407-CR-00260, 1995 WL 605442, at *1-2 (Tenn. Crim. App. Oct. 16, 1995). These defendants may perhaps be fairly punished as thieves. But their prior transgressions would not be proof that they are the individuals targeted by ACCA: potentially dangerous "career offenders * * * who commit * * * serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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FEBRUARY 2019